

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 27**

**SWIFT BEEF COMPANY**

**Employer**

**and**

**Case 27-RC-271964**

**UNITED FOOD AND COMMERCIAL WORKERS,  
LOCAL 7<sup>1</sup>**

**Petitioner**

**DECISION AND DIRECTION OF ELECTION**

The Employer operates a slaughterhouse and beef processing facility in Greeley, Colorado. Petitioner seeks, by an *Armour-Globe* self-determination election, to add six currently unrepresented employees employed in the classroom trainer classification (“petitioned-for voting group”) to an existing bargaining unit consisting of approximately 3,000 employees (“existing unit”) employed at the Greeley facility in a variety of classifications.<sup>2</sup>

By its January 28, 2021,<sup>3</sup> petition (“Petition”) Petitioner asserts the petitioned-for voting group is appropriate. In response, the Employer maintains this voting group is not appropriate because the employees in the petitioned-for voting group are supervisors under §2(11) of the National Labor Relations Act (“Act”), are managerial employees, and because the employees in the petitioned-for voting group do not share a community of interest with the employees in the existing unit. The Employer does not dispute that the classroom trainers are an identifiable and distinct group of employees.

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<sup>1</sup> The names of the parties appear as amended at hearing.

<sup>2</sup> Joint Exhibit 1 is a copy of the parties’ most recent collective-bargaining agreement, which defines the existing unit in Article 2 as: [A]ll production employees, including janitors, fabrication knife sharpeners, kill floor knife room technician, scale (weight range), grounds crew, inventory, hide plant, manifestors, and production trainers employed by the Company at its Greeley, Colorado beef plant, but excluding office and plant clerical employees, professional employees, selectors, beef graders/coordinators, cattle buyers, nurses, emergency medical technicians, fault reset, roll stock, scalars, warehouse persons, plant computer operators, console operators, Formax, K-Pak, blender, blood plasma operators, managerial, administrative, distribution, quality control/PIFS, engineering/maintenance employees, listers, inventory control coordinators, employees of independent contractors, guards, and supervisors as defined by the National Labor Relations Act.

<sup>3</sup> All dates 2021 unless otherwise indicated.

In addition to the issues described above, the other matter to be decided in the event an election is directed is the manner of election in light of the continuing COVID-19 pandemic.<sup>4</sup> The Employer argues that a manual election is appropriate and may be conducted safely. The Petitioner contends that a mail ballot election should be held.

A hearing officer of the National Labor Relations Board ("Board") held a videoconference hearing in this matter on February 25 and 26. Both parties filed briefs with me after the conclusion of the hearing. As explained below, based on the record, the briefs, and relevant Board law, I find the classroom trainers are not supervisors or managers, and the record establishes they do share a community of interest with the existing unit. Accordingly, I am directing the petitioned-for election in this case. Because of the ongoing COVID-19 pandemic, I am directing that election be conducted by mail.

## ***RECORD EVIDENCE***

### **A. The Employer's Operations**

The Employer operates a one million square foot slaughterhouse and beef processing facility in Greeley, Colorado, located in Weld County. The two production departments are harvest and fabrication, which together utilize most of the facility.<sup>5</sup> The harvest department slaughters incoming cattle and render the carcasses, removing portions not for human consumption. Sides of beef are then moved to the fabrication department, consisting of multiple production lines where beef is cut and trimmed by employees. These cuts of beef are then packaged and shipped to wholesalers.

Employees in the production departments in production areas are required to wear scrubs, steel-toe boots, hard hats, hairnets, and earplugs. Employees on the fabrication lines utilizing knives and other sharp implements are required to wear, at a minimum, mesh cut-resistant gloves, and may wear full mesh torso and arm coverings depending on their station. To allow easy identification on the floor, the Employer utilizes a system of hard hat colors associated with employee classification. Production employees wear white hard hats, production supervisors wear blue, and management wear green hard hats when on the floor. Other classifications have dedicated hard hat colors as well, including the classroom trainers at issue who wear red hard hats. New employees on the production floor are assigned gold hard hats for at least the first 30 days, or until they are deemed qualified in their positions.

In addition to the production departments the Employer also has several other support departments, including human resources, payroll, accounting, training, safety, sanitation, and quality assurance. The Greeley facility has three floors. The production departments use all the first floor and much of the second, while the support departments have offices located on the second and third floor.

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<sup>4</sup> In this Decision, the terms "COVID-19," "coronavirus," and "virus" will be used interchangeably.

<sup>5</sup> Consistent with the usage of the parties, in this decision the harvest and fabrication departments are referred to collectively as the "production departments."

The Employer typically hires 60 to 80 new employees per week to work in the production departments. Because of this high volume of incoming new employees, the Employer has an established system whereby classroom trainers, the employees at issue in this case, begin a five-day week of orientation each Monday for new hires.<sup>6</sup> At the end of this orientation week the new hires move to the positions that were determined by management prior to orientation. Classroom trainers then begin the following week with a new group of new hires participating in the orientation program.

## **B. Classroom Trainers**

### **i) Organization of the Facility**

The petitioned-for classroom trainers are members of the training department. The training manager, the department's manager, supervises the classroom trainers and the production trainers, the other classification in the training department. Production trainers, who are represented by Petitioner in the existing unit, work with the new hires in the production departments on the first and second floors, while the training manager and classroom trainers primary place of work are a cluster of rooms located on the third floor.

The primary space utilized by the classroom trainers is a 40-foot by 50-foot space that contains computers, desks, a projector, and other tools used to run the orientation. Four small rooms adjoin the classroom, a file room, training room, storage room, and a "cleanout" room. In addition to storage, the file room is used as a breakroom by some of the classroom trainers. The training room contains desks and computers and is used as a space for existing employees to perform required annual training updates. Protective mesh equipment is stored in the storage room, and the cleanout room is used to clean the mesh equipment returning to storage from the production areas. Because classroom trainers work primarily in this area, and not on the production floor, classroom trainers wear business casual attire with steel-toed shoes. They wear hard hats when they go to the production areas.

As noted, when new hires complete orientation with the classroom trainers they move to their positions in the production departments. At this point, they are trained on the specifics of their position by a production trainer assigned to that area. When not actively training employees, production trainers perform other tasks such as filling in on the production lines for employees that must leave the operating production line unexpectedly. Because the production trainers work in the production departments, they wear the scrubs, steel-toe boots, and other equipment necessary in the production departments.

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<sup>6</sup> In this decision the term "new hire" is used, where relevant, to distinguish employees that have just begun their employment and are attending the Employer's one-week orientation course from employees already at work in the facility.

## **Skills, Training, and Job Functions**

### **1. Skills**

As described more fully below, classroom trainers are responsible for directing tasks during new hire orientation. Accordingly, the first skill listed in the classroom trainer job description is the ability to communicate, specifically the ability to communicate in English. The training manager affirmed in his testimony that communication is the primary skill of the classroom trainers. In addition to communication the job description also lists skills that are essentially employee traits, “strong...leadership skills,” “self-motivated high sense of urgency,” and “able to perform in high stress situations,” and several skills reflective of the work environment, such as the ability to perform “heavy lifting,” and “work in both hot and cold temperatures.”

The job description contains one additional skill requirement, “must be bilingual.” Employees in the production departments are not required to be able to communicate in English or Spanish as a condition of their employment, and accordingly classroom trainers act as translators, if possible, when employees that do not speak English or Spanish are interacting with human resources, other support departments, and management. The Employer estimates as many as 39 primary languages are represented at the facility, and the six classroom trainers can, collectively, translate nine languages to English. Circumstances where translation is needed vary, but the classroom trainer job description provides examples, stating a classroom trainer will assist human resources and health services with translation, and will translate for employment interviews. All witnesses agreed that the ability to speak languages other than English and Spanish helps classroom trainers perform their job in the classroom.<sup>7</sup>

### **2. Training**

Classroom trainers are required to have a high school diploma or equivalent. There is no evidence that they are required to have any particular occupational license or certification related to teaching, or any other field. The Employer requires all employees to take annual training updates, and the classroom trainers take the same modules as production employees. The classroom trainers do not receive the supervisory training update, which addresses topics such as confidentiality, conflicts of interest, and ethics.

### **3. Job Functions**

As noted, the Employer typically hires 60 to 80 employees per week. Applicants apply online and the employment office arranges an interview with a manager from either the harvest or fabrication department, depending on need. If the Employer is prepared to offer an applicant employment after the interview, a classroom trainer

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<sup>7</sup> Although the classroom trainers are multilingual in about 9 languages, the record does not indicate how classroom trainers communicate with, or how materials are presented to, employees who are not conversant in those 9 languages.

normally escorts the applicant to the area of the facility where they would be employed, what the Employer identifies as a “realistic job preview.”<sup>8</sup> After that preview if the applicant is interested in employment, they will be offered the job. If the applicant accepts, they will be scheduled to report for orientation the following Monday. A new hire spends the first week of their employment in an orientation class run by a classroom trainer.

**a. Instruction**

The orientation class begins on Monday morning with the classroom trainer meeting the new class outside the facility and providing a brief tour of important areas of the facility. The class then reports to a classroom, where instruction takes place over the remainder of the week. Classroom trainers are provided a curriculum, including approximately 8.5 hours of programming provided by a third party, referred to as the “Alchemy” program. Alchemy consists of videos and slide presentations in English and Spanish on topics such as occupational health and safety and practices to avoid contamination of product. Classroom trainers document participation, answer questions, and attempt to resolve any language issues. Some Alchemy modules require a test or other assessment, which new hires take on the computers in the classroom. Continued employment requires that all new hires complete 100 percent of the Alchemy course, but participants are not required to obtain a certain score or grade on the assessments. There is no evidence in the record that a new hire has ever “failed” Alchemy or the training program due to inability. Similarly, there is no evidence a new hire has ever been held back or required to repeat the orientation week program. Classroom trainers are able to monitor quiz results in the system for the topics covered to identify where attendees may need assistance. Attending orientation is sufficient to move a new hire past orientation and to their specific job assignment. An employee’s specific job assignment is determined at the time of hire, so the orientation week does not impact, or vary because of, this job assignment.

Classroom trainers are not allowed to omit any part of the training curriculum or excuse a participant from a portion of the program. The classroom trainers are provided with a schedule or checklist concerning the topics to be covered. One classroom trainer described a presentation on how to safely sharpen a knife. Two classroom trainers testified at hearing regarding their role in conveying the materials to new hires, and in particular what they do when the class or an individual employee struggles with a topic. Both agreed they answer questions and may rephrase or repeat content from an Alchemy presentation if employees are confused or have questions, assuming time allows.

The orientation week also includes presentations by many of the support departments. For example, a representative of the quality control department talks to new hires about foreign object controls, the management team addresses the possibility of advancement, and human resources conducts a presentation on benefits. Classroom

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<sup>8</sup> The record shows that this practice has been somewhat curtailed due to COVID-19 concerns.

trainers are responsible for coordinating the availability of speakers and the Alchemy modules such that the orientation program can be completed on time.

Late in the orientation week, the classroom trainers will distribute protective mesh gear to the new hires. Because of the value of this protective gear, the classroom is locked when a classroom trainer is not present, and the classroom trainers have the key.

The Employer employs a total of six classroom trainers on two shifts. It is not clear from the record precisely how the classroom trainers are scheduled, but the Employer will typically have one orientation class per week on day shift, and one orientation class on second shift. A single classroom trainer is able to run the orientation class, and it appears from the record that, if a second classroom trainer is also scheduled, they are performing the various other duties of the position, translating, checking in and out protective equipment, and escorting applicants on the realistic job preview. The record indicates the classroom trainers will also do these tasks, and particularly distributing new protective equipment, throughout the day. This includes both before class starts, after class ends, and during class when the classroom trainer is able.

#### **b. Other Functions**

In addition to distributing protective mesh gear to new hires described above, classroom trainers also issue replacement equipment to employees whose equipment breaks or is otherwise not sufficient. In these instances, the employee must obtain written permission for replacement equipment from their floor supervisor. The employee then takes this note and the defective equipment to the classroom where a classroom trainer will issue the replacement equipment.<sup>9</sup> Classroom trainers document the exchange, clean the defective or broken equipment in the cleanout room, and then forward the equipment for repair or replacement. If new protective equipment is needed for the next orientation, a classroom trainer submits the equipment request to the Supply department. If the order is large, a supply manager will contact the training manager.

As part of the orientation process, the classroom trainers also assign lockers to each new employee. At least some classroom trainers have master keys for the lockers in case an employee forgets the lock combination or if a locker needs to be cleaned out after an employee leaves employment. If the order is large, the supply manager will call the training manager.

#### **c. Responsible Direction**

The Employer maintains classroom trainers have responsibility for the new hires and are accordingly held accountable for their actions. The Employer placed in the

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<sup>9</sup> If it is a production trainer who needs a replacement, the training manager will issue a note approving the equipment exchange.

record three disciplinary notices it maintains illustrate this point. The first, a verbal counseling dated January 11, 2018, was issued to a classroom trainer for failing to present the correct materials, called a playlist, to new hires. It states, in the “supervisor’s comments” section:

[Classroom trainer] failed to select the proper playlist causing [new hires] to train on the wrong courses. [New hires] were not able to hit the floor on time because they had to retrain on the proper courses. [Classroom trainer] needs to spend more time being careful in his work.

A second discipline, issued less than a month later to the same classroom trainer, was an unspecified disciplinary action. In that document the supervisor’s comments section states:

Not meeting expectations. Sending new hires to the floor without completing all courses and having other new hires finish classes for that employee.

A third discipline, a written warning issued to another classroom trainer on January 18, 2018, was recorded on a different form. That form contains a section identified as “What’s the problem,” which states:

[Classroom trainer] failed to verify that new hire had proper training before hitting the floor. [New hires] did not have their proper PPE and were not dressed for the floor.

This was followed by a section titled “What’s the impact,” which stated, “Slaughter had to spend an hour and a half getting them ready.”

#### **d. Discipline**

The Employer also contends that a classroom trainer’s responsibility for their classroom extends to trainers monitoring the conduct of new hires while in orientation. The record contains evidence of approximately 75 employees, in 2019 and 2020, whose employment ended during their orientation week, approximately half of whom were categorized as voluntary quits. Of the half whose employment was terminated, the most common reason was an alcohol or drug violation. The remaining discharges, approximately a half-dozen, are for reasons including insubordination, unsatisfactory performance, harassment, and workplace violence.

The record contains significant information regarding a discharge for insubordination that occurred shortly before the hearing. The record does not detail the circumstances surrounding the other insubordination discharge, or the discharges for unsatisfactory performance, harassment, or workplace violence.

Regarding the recent discharge, which occurred in February, the termination notice states the employee in question was terminated for using their phone, being disruptive in class, and not following the classroom trainer’s instructions. The training

manager at that time testified that a classroom trainer on the evening shift called and reported that an employee in his class was being loud and disruptive. After a brief discussion, the training manager contacted a human resources (HR) manager on-site on the evening shift and asked the HR manager to sit in the class. The HR manager reported to the training manager that he did not observe any disruptive behavior. In his testimony, the involved classroom trainer confirmed that the employee calmed down while the HR manager was in the room. Shortly after HR manager left the classroom, the employee resumed her disruptive behavior, so the classroom trainer contacted the training manager to describe the conduct. The training manager indicated that the trainer should keep in contact regarding how the class was progressing.

Later that evening, the training manager received a third call from classroom trainer about the employee. According to the training manager, the trainer stated the disruptive employee was being "outrageous," that she would not calm down, and that he did not "think she's going to make it on the floor." The training manager told the trainer to excuse the class for the night, and that he would talk to the disruptive employee. The training manager met with the employee in question when she reported to work the following day. According to the manager, he "got her side of the story" but after the employee demonstrated disruptive behavior during their meeting, he terminated the employee. In his testimony, the training manager attributed the termination to the classroom trainer's recommendation. The classroom trainer testified that he never said the disruptive employee wasn't "going to make it on the floor," and that he never made a recommendation but merely reported what occurred.

Another classroom trainer testified that it is rare to have a disruptive employee in class, but if it occurs, he will take the employee to the training manager's office and the training manager will speak to the employee. This classroom trainer also testified if he had an employee fall asleep in class, he would report this to the training manager.

Regarding drug and alcohol violations, the record indicates the Employer has several relevant policies. If an employee is suspected of impairment due to drug or alcohol use, the employee is sent to an on-site testing facility. However, the Employer has a policy that no employee is referred for a test based on a single assessment; a reasonable suspicion of impairment is required by *two* individuals before an employee is sent for testing. If the test is positive, the employee is automatically terminated. Similarly, the Employer has an attendance policy that automatically results in an employee's discharge if they reach certain thresholds of absenteeism. The record does not contain details regarding the classroom trainers reporting new hires for drug and alcohol testing or reporting attendance violations.

#### **e. Other Considerations**

The classroom trainer job description does not reference any supervisory duties or responsibilities. One document in the record, titled "job specific training," contains



instructions for “supervisors” and the employee, and a signature line for each.<sup>10</sup> The copy in the record is unsigned, but the training manager testified the classroom trainer is expected to sign the supervisor line as part of documenting new employees training.

**ii) Degree of Functional Integration, Contact, and Interchange**

The Employer’s process utilizes production lines that begin with live cattle and end with packaged cuts of beef ready for wholesale distribution. Because of the Employer’s high demand for employees, it runs a standardized orientation and training program. A combination of human resource and management personnel hire many new employees each week. All these new hires attend the classroom trainers’ orientation, and each receives the same instruction. At the end of the week all new hires report to production trainers, and the process then repeats.

Regarding contact, because the classroom trainers work primarily in the classroom on the third floor, they have relatively little contact with employees in the existing unit working in the production departments on the first and second floors, outside the tours given at the beginning of the week, job previews, occasional translation assistance, and equipment exchanges. However, the classroom trainers are in constant contact with the new hires in their classroom during the orientation week.

There is no evidence of temporary interchange between the classroom trainers and the existing unit. Unlike production trainers, classroom trainers do not fill-in on production lines, or even fill in as production trainers. Their role is strictly limited to the duties of a classroom trainer. There is significant evidence of permanent interchange, however, as four of the six current classroom trainers were previously employed by the Employer in classifications that are part of the existing unit.

**iii) Terms and Conditions of Employment**

The Employer classifies the classroom trainers as salaried, but the classroom trainers are non-exempt employees, eligible for overtime. While classified as “salaried,” classroom trainers punch in and out for start and end times, lunch, and breaks, as do employees in the existing unit. Employees in the existing unit have their pay reported as an hourly wage. They too are non-exempt employees eligible for overtime.

The collective bargaining agreement covering the existing unit contains an 8-grade wage scale. That scale in turn is applied to over 400 jobs in the production departments. The most recent update to that agreement identifies the range of the wage scale as \$18.00 to \$22.60 an hour. The classroom trainers that testified at hearing are paid \$19.70 and \$20.10 an hour, respectively. The classroom trainers, like the existing unit employees, received a \$1.80 incentive pay increase.

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<sup>10</sup> This document, Employer’s Exhibit 6, outlines three categories of training, including Personal Protective Equipment (PPE), Emergency Evacuation Procedures, and Job Specific Training.

The classroom trainers, as non-represented employees, are covered by the Employer's "Salary and Salary Non-Exempt Employees," handbook. The handbook covers topics such as attendance, workplace safety, and leave. This handbook applies to the Employer's employees outside the existing unit, which necessarily includes management, but there is nothing specific to management or supervision in the handbook. Regarding fringe benefits, classroom trainers, and all other employees outside the existing unit, receive the same fringe benefits. The work rules and benefits of the existing unit are set by the current collective bargaining agreement.

#### **iv) Common Supervision**

As noted above, the classroom trainers are part of the training department and report to the training manager. Recently, the Employer reorganized the reporting structure of certain departments under a pilot program, and the training manager now reports to an assistant general manager in the production department managerial hierarchy. Previously the training manager reported to the HR director.

The record indicates classroom trainers participate in a "360 review," whereby they are evaluated by other classroom trainers, the training manager, and members of management with whom they interact on certain "core values," such as determination, discipline, ownership, humility, sincerity, and simplicity. The record contains a general reference to this evaluation process having some impact on merit raises for the classroom trainers, but the record does not contain other details regarding the evaluation process, including who is the ultimate decision maker. The classroom trainers may provide anonymous comments for the 360 review of others in the same group – classroom trainers, the training manager, and members of management – but there is no contention the classroom trainers have any decision-making authority or involvement in these evaluations beyond providing anonymous comments.

Once a month the classroom trainers meet with the training manager and the product manager to review and discuss new hire retention information, but there is no evidence this meeting involves policy development. The training manager testified that classroom trainers are expected to incorporate the information provided in these meetings in the classroom, but the record does not contain specifics regarding how this occurs. The classroom trainers also attend training department meetings with the training manager and the production trainers.

### **ANALYSIS**

#### **A. Supervisory Status**

##### **i) Section 2(11) Standard**

Supervisory status under the Act depends upon whether an individual possesses authority to act in the interest of the employer in the matters and in the manner specified in Section 2(11) of the Act, as follows:

The term “supervisor” means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

Possession of any one of these authorities is sufficient to confer supervisory status if the authority is exercised with independent judgment and not in a routine manner. *Oakwood Healthcare, Inc.*, 348 NLRB 686 (2006); *NLRB v. Kentucky River Community Care, Inc.*, 532 U.S. 706, 711 (2001). As stated by the Board in *Oakwood*, “to exercise independent judgment an individual must at a minimum act, or effectively recommend action, free of control of others and form an opinion or evaluation by discerning and comparing data.” *Oakwood* at 692.

The burden of establishing supervisory status rests on the party asserting that status. *Croft Metals, Inc.*, 348 NLRB 717, 721. (2006). Supervisory status cannot be established by record evidence which is inconclusive or otherwise in conflict. *Phelps Community Medical Center*, 295 NLRB 486, 490 (1989). Mere inferences or conclusory statements, without detailed, specific evidence, are insufficient to establish supervisory authority. *Lynwood Manor*, 350 NLRB 489, 490 (2007); *Golden Crest Healthcare Center*, 348 NLRB 727, 731 (2006). Any lack of evidence in the record on an element necessary to establish supervisory status is construed against the party asserting supervisory status. *Dean & Deluca New York, Inc.*, 338 NLRB 1046, 1048 (2003).

## **ii) Section 2(11) Factors**

### **(1) Assign**

In the Section 2(11) context, “assignment” is defined as the “giving [of] significant overall duties, i.e., tasks, to an employee,” but “significant overall duties” do not include “ad hoc instructions to perform discrete tasks.” *Oakwood Healthcare*, 348 NLRB at 689. Assignment also includes designating an employee to a place, such as a location, department, or wing, and appointing an employee to a time, such as a shift or overtime period. *Id.* Distributing assignments to equalize work among employees’ well-known skills is considered a routine function not requiring the exercise of independent judgment. *The Arc of South Norfolk*, 368 NLRB No. 32 (2019), slip op. at 4, citing *Oakwood* at 689, 693, 695.

The Employer argues the classroom trainers “assign” work in that they tailor individual trainings based on their assessment of employees understanding. In support of this contention the Employer relies on the testimony of the classroom trainers explaining how they may “pull [an employee] aside, talk to them” for a one-on-one if they appear to have difficulty comprehending a lesson, or if the Alchemy assessments reflect a poor understanding. The Employer also references testimony from a classroom

trainer stating that he adjusts his “teaching techniques” if he determines a class is having difficulty. The Employer argues this adaptation elevates the classroom trainers above purely ministerial role in implementing already-established assignments. In short, the Employer contends classroom trainers do more than follow a checklist and press play on Alchemy videos.

Contrary to the Employer, I find classroom trainers do not assign work to employees during the orientation week program. There is no contention the classroom trainers develop or create the orientation week curriculum. As such, I find the only way they could “assign” work to employees during orientation is if they were to utilize independent judgment to omit, modify, or add to the required curriculum. The evidence demonstrates the opposite, that classroom trainers have no authority to modify the program. The Employer’s argument, focused on the way the orientation program is presented, attempts to categorize decisions such as slowing down or repeating a section of the orientation as a modification, but I disagree. Similarly, if a classroom trainer has a one-on-one conversation with an employee to clarify a point in the curriculum it does not constitute omitting, modifying, or adding to that curriculum.

There is no evidence that classroom trainers designate new hires to a place, such as a department, or a time, such as a shift or overtime period. In orientation the time and location are predetermined as is the curriculum, the new hires must simply attend. Any determinations to a place or time after orientation ends, where they will work and on what shift, are made at the time of hire and there is no evidence anything that occurs during orientation impacts on these assignments.

Classroom trainers have a specialized role in the Employer’s operation, to greet new hires and review the Alchemy materials and the rest of the orientation curriculum with the new hires, but that role does not include assessing or ranking the new hires, modifying the curriculum, or otherwise adapting the materials in a way that utilizes independent judgment. Absent such evidence, I find the classroom trainers do not assign work.

## **(2) Responsibly Direct**

The Board has defined “responsibly to direct” in §2(11) as: “If a person on the shop floor has ‘men under him,’ and if that person decides ‘what job shall be undertaken next or who shall do it,’ that person is a supervisor, provided that the direction is both ‘responsible’... and carried out with independent judgment.” *Oakwood*, 348 NLRB at 691. The Board explained that direction is “responsible” when the person delegating the task is held accountable for the performance of the task by others and there is the prospect of adverse consequences if the tasks are not performed properly. *Id.* at 692. For example, lead persons in a manufacturing setting were held accountable where they received written warnings because their crews failed to meet production goals. *Croft Metals*, 348 NLRB at 722. On the other hand, when a charge nurse was disciplined for failing to make fair assignments, she was held accountable only for her own performance and not that of other employees. *Oakwood*, 348 NLRB at 695.

Responsible direction in the instant case is a question of the three examples of classroom trainer discipline from 2018. As described in the cases cited above, when an asserted supervisor fails to perform their job and is disciplined it does not demonstrate accountability, but where the failure of those ostensibly reporting to them is attributed to the asserted supervisor this can demonstrate accountability. This distinction can be seen in some of the discipline at issue in *Croft Metals*, supra. There, when a production line was at a standstill, and when employees were not busy and not at their workstations, it was not the employees that were disciplined, but the leads that were their purported supervisors. *Croft Metals* at 719, fn. 11

Here, I find each discipline at issue was issued for the deficiency of a classroom trainer, not the new hires in the performance of their assigned work, and as such they do not reflect accountability. Regarding the first discipline, it states the classroom trainer failed to play the proper Alchemy playlist, and accordingly failed to train the employees correctly. Here the failure, playing the wrong playlist, was entirely in the control of the classroom trainer. The employees in the orientation class were involved, in the sense that they were the audience, but it can hardly be said that they did anything wrong. I find this differs from the *Croft Metals* example where the employees were not working, but it was the supervisor that was disciplined for failing to correct the issue.

Regarding the second, this discipline states a classroom trainer was sending new hires to the floor without completing training, and then was having others finish the classes. While the exact nature of the underlying conduct is not entirely clear in this example, it is again apparent that the failure was that of the classroom trainer in not performing his job in that instance. Again, new hires were involved in that they were the individuals whose training was not completed, but there is no evidence that the employee failed to perform and that the supervisor was then accountable.

The final discipline is similar, new hires were sent to the line without the proper training and the proper protective gear. The classroom trainer is disciplined for their failure to have the new hires prepared. Having finished their orientation and having just reported to their new assignments, the employees did nothing wrong in having the incorrect equipment. This is a failure totally within the control of the classroom trainer.

I do not find that the examples relied upon by the Employer or that the record demonstrates the classroom trainers are held accountable for the actions of the new hires. Instead, I find each is merely evidence of a failure of classroom trainer in their core responsibilities that happened to involve new hires. As such, I do not find the classroom trainers responsibly direct the new hires.

### **(3) Discipline and Discharge**

The actual authority to discipline, rather than “paper authority” present in job descriptions and other documents is necessary to establish supervisory status. *Golden Crest*, 348 NLRB at 731, quoting *Training School at Vineland*, 332 NLRB 1412, 1416 (2000). The power to point out and correct deficiencies in the job performance of other

employees is insufficient to establish that an employee is a supervisor under Section 2(11) of the Act. *Franklin Home Health Agency*, 337 NLRB 826, 830 (2002). In addition, an employee does not become a supervisor if his or her participation in personnel actions is limited to a reporting function and there is no showing that it amounts to an effective recommendation that will affect employees' job status. *Ohio Masonic Home*, 295 NLRB 390, 393 (1989). Rather, to confer §2(11) status, the exercise of disciplinary authority must lead to personnel action, without the independent investigation or review of other management personnel. *Beverly Health & Rehabilitation Services*, 335 NLRB 635 (2001).

There is no contention the classroom trainers can discipline employees in the classroom without the involvement of management. Instead, the Employer argues classroom trainers can effectively recommend discipline of employees that are insubordinate or act in some other way that warrants action. The record contains evidence of terminations occurring during orientation week for: (1) insubordination, (2) drug and alcohol violations, and (3) attendance. Each will be considered as a basis for finding the §2(11) authority to discipline.

**(a) Insubordination**

The record contains significant evidence regarding the February insubordination termination, the incident involving a classroom trainer and training manager. This evidence establishes that the classroom trainer made several reports to a manager, and that the employee involved was terminated after being observed by the HR manager and then interviewed by the training manager. The question is whether the classroom trainer effectively recommended that termination, or whether the training manager made his own assessment. I find the evidence does not support concluding that the classroom trainer effectively recommended the termination.

When the training manager was notified of the issue, he took steps toward an independent assessment. The training manager first asked the HR manager to sit in the class to report his observations, and then the training manager spoke directly to the employee. The record establishes that the training manager did not rely on the assessment of the classroom trainer, but terminated the employee for insubordination after having observed the employee's conduct directly.

The Employer contends that the classroom trainer offered a recommendation that he did not "think she's going to make it on the floor." This is disputed by classroom trainer and, if accepted as true, it is only an opinion and it is apparent that the training manager's investigation continued thereafter. Accordingly, this example does not establish that the Employer relied on this statement in order to establish that the classroom trainer effectively recommended the termination.

Regarding the other insubordination discharge, as well as the unsatisfactory performance, harassment, and workplace violence discharges, the record does not contain information regarding these incidents sufficient to draw any conclusions

regarding the role of a classroom trainer, if any, in these incidents. Taken together, I do not find the record establishes the classroom trainers effectively recommend discipline or discharge to establish §2(11) authority.

**(b) Drug and Alcohol Violations, Attendance**

The record establishes that a number of employees have been discharged during their orientation week for violations of the Employer's drug and alcohol policy. The record does not contain details regarding these discharges sufficient to make any determination regarding classroom trainer involvement. Moreover, even if I was to infer, given the amount of time classroom trainers spend with new hires during the orientation week, that classroom trainers were involved in reporting any incidents, the record makes clear that no single employee can refer an employee for a drug or alcohol test, as the policy requires a second reasonable assessment of impairment. Further, once an employee has a positive test, by policy, their employment is terminated. Given these circumstances, the record does not support a conclusion that a classroom trainer can effectively recommend discharge for a drug and alcohol violation.

Any contention regarding terminations of employment for attendance violations faces a similar challenge. At most, the classroom trainer is reporting that the new hire is absent, but even this is unlikely as time and attendance are recorded by an employee punching in and punching out; reporting an absence would appear unnecessary. Again, the record simply does not include details sufficient to find these disciplines or discharges are in any way effectively recommended by the classroom trainer.

Finally, I note the record does contain incidental statements regarding classroom trainers reporting employees to the training manager. This testimony, for example that a classroom trainer would refer the employee to the training manager for sleeping in class or being disruptive, is similarly insufficient under §2(11). First, it appears that the witness was either posing or responding to a hypothetical, not reporting the specifics of an incident that had actually occurred. Second, at most this establishes the classroom trainer would report the individual, so it is unclear what judgment, if any was involved and whether the training manager would engage in any independent investigation before taking any action.

**(4) Secondary Indicia**

Secondary indicia may be considered in establishing supervisory status, but these indicia are insufficient on their own to establish that status where a primary §2(11) factor is not present. *Ken-Crest Services*, 335 NLRB 777, 779 (2001).

Here, I recognize the record contains evidence of several secondary factors. The classroom trainers wear casual clothing, similar to management, and not the scrubs and other work wear of most employees in the existing unit. Additionally, classroom trainers have keys to the classroom and schedule their own break times according to the flow of training, unlike production employees who take breaks when their production line has a

scheduled break. However, absent evidence of a primary indicia this evidence alone is not enough to establish supervisory status.

The Employer argues in favor of several additional secondary factors, such as different terms and conditions of employment and attendance at management meetings. I do not find the evidence supports these arguments. Regarding terms and conditions of employment, the Employer argues classroom trainers are salaried similar to management. As I have explained in more detail in the following section regarding community of interest, while the Employer draws an equivalence between the salaried non-exempt status of the classroom trainers and the salaried pay structure of management, I do not find them to be the same.

Regarding management meetings, the evidence does not establish either the training department meetings or the retention meetings attended by classroom trainers involve any sort of policy development or decision making. Instead, to the extent a representative of management is present, the function is to provide direction to the classroom trainers, or for the classroom trainers to provide information to management.

#### **(5) Conclusion Regarding Supervisory Status**

Because the evidence does not establish classroom trainers have the authority to assign duties to, responsibly direct, discipline or discharge new hires, or effectively recommend the same, I conclude that the Employer has not met its burden of establishing the classroom trainers in the voting group sought are supervisors within the meaning of Section 2(11) of the Act.

#### **B. Managerial Status**

Managerial employees are those employees in the highest levels of an employer's hierarchy, charged with taking or recommending discretionary actions that effectively control or implement their employer's policy. *NLRB v. Yeshiva University*, 444 US 672, 682 (1980). More specifically, Board law defines managerial employees as those employees that formulate, determine, and effectuate an employer's policies by expressing, and making operative, the decisions of their employer, and those who have discretion in the performance of their jobs independent of their employer's established policy. *The Republican Co.*, 361 NLRB 93, 95-96 (2014); *Bell Aerospace*, 219 NLRB 267, 288 (1975); *General Dynamics*, 213 NLRB 851, 857 (1974). Although not defined by statute, the Board excludes these employees from bargaining units on the basis Congress regarded managerial employees "as so clearly outside the Act that no specific exclusionary provision was thought necessary." *Bell Aerospace* at 283.

To be considered managerial, employees must exercise discretion within, or independent of, their employer's policies, and as such considerable discretion does not render an employee managerial where their decision must conform to established policy. *Yeshiva University*, 444 US at 682-683. The party asserting managerial status bears the burden of proving that status. *The Republican Co.* at 96, citing *LaMoyne-*



*Owen College*, 345 NLRB 1123, 1128 (2005); *Waste Management de Puerto Rico*, 339 NLRB 262, 279 (2003).

The Employer asserts the classroom trainers become managers “by expressing and making operative decisions of their employer.”<sup>11</sup> The Employer does not contend the classroom trainers have any role in policy development, instead the Employer argues that in practice classroom trainers express and implement policy when they inform new hires of the Employer’s workplace safety rules, human resources policies, corporate culture, and equal opportunity employment practices.

It is true the Board has utilized the term “express” in describing policy and managerial status; or as phrased in *Yeshiva*, supra, managerial employees take or recommend discretionary actions that effectively control or implement their employer’s policy. However, the Employer’s focus on words such as “expressing” and “implementing” ignores the very heart of the Board’s standard: the operative decision making. The Employer does not cite to any cases where the Board has found rote presentation of policies demonstrates managerial status. That is because merely conveying policies, completely separate from formulating or decision-making related to those policies, is not sufficient to establish managerial status. To the extent the Employer argues the classroom trainers make “decisions” regarding policy in the classroom, such as repeating a policy during orientation if new hires do not understand, these are merely decisions concerning the presentation of information, not content. The Employer cites to no authority where adjustments to the presentation of a policy is the decision-making contemplated by the Board’s test.

Here, I find that the Employer has failed to carry its burden. Demonstrating managerial status requires showing the employee in question acts with such discretion and independence that they are effectively creating or operating free of policy. Here, the evidence demonstrates the opposite: classroom trainers follow a very specific curriculum in the classroom and have no discretion in modifying that curriculum.

### **C. Appropriateness of Self-Determination Election**

#### **i) *Armour-Globe* Standard**

Board elections typically only present the question of whether employees wish to be represented by a labor organization. However, the Board will, under some circumstances, conduct an election that also resolves a unit placement issue, referred to as a self-determination election. One type of self-determination election is a so-called

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<sup>11</sup> On brief, the Employer maintains that managerial status can be demonstrated by either the test cited above, essentially originating with *Bell Aerospace*, or by the alternative test put forth by the 7th Circuit Court of Appeals in *N.L.R.B. v. Case Corp.*, 995 F.2d 700, 703 (7th Cir. 1993), focused on “divided loyalty.” The Employer makes several arguments regarding the alleged divided loyalty of the classroom trainers. I note that the Board in the underlying case, *Case Corp.*, 304 NLRB 939 (1991) cited to *Bell Aerospace* and applied the same law cited here. I am bound by the Board’s standard; to the extent the Employer asserts the Board should adopt a second standard or modify its current managerial standard I consider that an argument directed to the Board and I will not address it here.

*Armour-Globe* election, directed where a petitioner seeks to add a group of unrepresented employees to an existing unit, derived from *Globe Machine & Stamping Co.*, 3 NLRB 294 (1937) and *Armour & Co.*, 40 NLRB 1333 (1942). An *Armour-Globe* election determines not only whether the employees wish to be represented, but also whether they wish to be included in the existing unit. *Warner Lambert, Co.*, 298 NLRB 993 (1990).

When a petitioner seeks an *Armour-Globe* election the first consideration is whether the voting group sought is an identifiable, distinct segment of the workforce. *St. Vincent Charity Medical Center*, 357 NLRB 854, 855 (2011), citing *Warner Lambert* at 995. Whether a voting group is an identifiable, distinct segment is not the same question as whether the voting group constitutes an appropriate unit; the analysis if a petitioner was seeking to represent the employees in a standalone unit. *St. Vincent* at 855. Instead, the identifiable and distinct analysis is merely whether the voting group sought unduly fragments the workforce. *Capitol Cities Broadcasting Corp.*, 194 NLRB 1063 (1972).

If the voting group sought is an identifiable and distinct segment of the workforce, the question then is whether the employees in that voting group share a community of interest with the existing unit. As stated by the Board, when petitioner seeks an *Armour-Globe* election “the proper analysis is whether the employees in the proposed voting group share a community of interest with the currently represented employees, and whether they constitute an identifiable, distinct segment.” *St. Vincent* at 855.

## **ii) Identifiable and Distinct**

The parties stipulated that the employees in question constitute an identifiable and distinct segment of the workforce. The record evidence is consistent in that the voting group is a separate classification within the training department and that they perform the same tasks that others do not perform. Accordingly, the petitioned-for voting group is not an arbitrary segment, and I accept this stipulation.

## **iii) Community of Interest Factors**

### **(1) Organization of the Facility**

The classroom trainers are organized in a training department with the production trainers, employees that are in the existing unit. The Employer makes several arguments distinguishing the production trainers from the classroom trainers, i.e. different work location and training employees on different subjects, but none of these distinctions go to the Employer’s administrative organization, the factor under consideration. The Employer also attempts to diminish the importance of the shared training department by highlighting that the production trainers constitute less than one percent of the existing unit. However, the nature of a such a large unit, over 3,000 employees, is that specialization is likely to exist and departments will be varied and specific. Indeed, the number of petitioned-for employees is small, only six, reflecting the specialized nature of the training department.

The Employer cites to no Board law where employees, in the *Armour-Globe* context, are organized together in a shared department, and this is discounted because of the department's small size relative to the overall existing unit. Further, the classroom trainers and production trainers are the only non-supervisory employees in the department. As such, the classroom trainers are the only non-supervisory employees in the training department not included in the existing unit.

Given that the classroom trainers are organized in a department with the production trainers, and the production trainers are included in the existing unit, I find this factor weighs in favor of finding a community of interest between the classroom trainers and the existing unit.

## **(2) The Nature of Employee Skills, Training, and Job Functions**

Regarding employee skills, the classroom trainers have a skill set, primarily focused on communication, that is unique in its setting – the classroom – but not its purpose. To the extent good communication is synonymous with good training, certainly the production trainers are using the same skill to teach employees specific skills on the production lines. The classroom trainers and production trainers are conveying different content to employees, orientation as compared to meat cutting and other job specific tasks, but nothing in the record suggests that the skill of communicating is unique to the classroom.

There is also nothing in the record that suggests the training of the classroom trainers sets them apart from the existing unit. They are not required to have any particular education, licensing, or certification, and they take part in the same annual training “update” as the employees in the existing unit. The Employer argues that the classroom trainers are not simply trainers, but teachers, highlighting the teaching background of at least one classroom trainer. This may be true, but certainly there is no evidence that the Employer requires teaching credentials or formal experience.

I find the job duties of the classroom trainers are somewhat unique. The Employer operates a large facility with a large workforce, and duties are specialized. There is no contention any other classification is responsible for providing orientation information to new hires. However unique these duties are is a function of how broadly training is defined. As noted above, classroom trainers are the only employees performing training in a classroom setting and the only classification addressing orientation materials. While these specific details are unique, at a general level, classroom trainers are responsible for training and this is a responsibility shared with the production trainers who are in the existing unit.

The record does indicate that classroom trainers act as interpreters, and I do find this is a unique job duty, as there is no evidence that the Employer considers translation a job duty of any other classification. Given the wide number of primary languages spoken in the Greeley facility, I am not inclined to consider being bilingual a unique

“skill” of the classroom trainers, it seems likely that a portion of the Employer’s workforce is multilingual. I additionally note one of the classroom trainers testified at hearing that he is not bilingual. Taken together, I do not find that the Employer requires bilingualism or multilingualism to be a requirement of the classroom trainer position, or a skill unique to the classroom trainers. Instead, I find the evidence establishes the at least some of the classroom trainers are capable of translation and being required to translate is a duty unique to the classroom trainer position.

Finally, I would note that throughout its arguments regarding job functions the Employer creates a distinction between the employees in the production employees, working with cattle, rendering carcasses, and trimming meat, and the classroom trainers, working in what is essentially an office space. While this distinction is accurate, it also diminishes that the existing unit is large and appears from the record to include employees in roles such as the grounds crew and departments such as sanitation, hygiene, and safety that are not directly handling livestock or cutting meat.

Ultimately, I find the skills, training, and job functions factor is a neutral factor. While the communication skills of the classroom trainers are shared with the production trainers, and the classroom trainers lack any training distinguishing them from the existing unit, the classroom trainers do have some unique job duties.

**(3) Degree of Functional Integration, Contact and Interchange**

**(a) Functional Integration**

The Employer has a highly integrated production process and it also has a very integrated mechanism preparing its new hires for their positions. The amount of hiring is so significant that it is efficient for the Employer to maintain a multi-step training process, with classroom trainers focused solely on the classroom portion while production trainers are responsible for the job specific portion of new hire training. Together, the training department is taking a very high number of new employees, 60-80 per week, and preparing them for work on in the production departments.

The Employer argues that because the classroom trainers are physically separate from the employees in the production departments, they are not functionally integrated. I do not find that the cases cited by the Employer on brief, *Transerv Systems*, 311 NLRB 766 (1993) and *Marian Manor for the Aged and Infirm, Inc.*, 333 NLRB 1084, 1096 (2001), stand for the proposition that functional integration is limited to two employees working in subsequent stations on a production line, as the Employer suggests. As noted above, I find that the Employer’s orientation system is highly integrated with the production departments because it the only source of orientation for all the employees entering these departments. Every employee in the production departments starts in the orientation classroom, even if they then move beyond it, returning only for their annual training update. The role of the classroom trainers may be specialized, but it is not uninvolved with the production departments. In that regard, the

function of training is not only part of one department, and the current training manager will now report to the assistant general manager on the production side rather than the HR department in order to foster ownership of retention by the production supervisors once employees leave the training classroom. While this is a “pilot” program, the record does not establish an end date and further confirms the existing integration of the training function at this facility.

**(b) Contact**

Regarding contact, the Employer makes several arguments against a community of interest based on the small amount of time the classroom trainers spend in the production department areas, as compared to the classroom on the third floor. However, as noted previously, I find these arguments simply reinforce the large, specialized nature of the Employer’s workforce. The classroom trainers spend a small amount of time in these departments because their role is so specialized that much of their time is devoted to the new hires. It is not disputed that the new hires will go on to work in the production departments, they are simply at the beginning of that process. I do not agree with the Employer that the classroom trainers do not have regular contact with the existing unit because the classroom trainers are rarely on the first and second floor. The new hires are part of the existing unit, and the classroom trainers are in constant contact with the new hires during orientation. There is some other contact with bargaining unit employees evident in the record, albeit infrequent to each individual unit employee. The classroom trainers are tasked with the annual Alchemy training for those 3000 employees, provide employees with replacements for their damaged protective equipment as needed, and are called upon to provide interpretation for unit employees.

The Employer’s other argument regarding contact is that, acknowledging the classroom trainers are in constant contact with the new hires throughout the orientation week, this should be disregarded because the relationship is one of teacher and student. The Employer cites to *W. Elec. Co., Inc.*, 126 NLRB 1346, 1356 (1960) for the holding that this relationship precludes a community of interest. I disagree. In *W. Elec.* the Board, in a lengthy decision addressing professional employees, included one a few lines finding that instructors offering courses to graduate engineers, at training centers located in leased facilities separate from the Employer’s manufacturing plants, did not share a community of interest with the engineers at issue. *Id.* In doing so, the Board cited only to *Westinghouse Air Brake Co.*, 121 NLRB 636, 638 (1958), a case discussing professional employees, making no reference to teachers and students, but only to geographic separation of patent attorneys excluded from the unit at issue. *Id.* I do not find that the passing reference cited by the Employer supports the weight the Employer assigns to it, discounting the close contact of the classroom trainers and new hires. Overall, I find contact with at least some of the bargaining unit employees supports the community of interest with the petitioned-for employees.

**(c) Interchange**

Regarding interchange, there is no evidence of *temporary* interchange between the classroom trainers and the existing unit. Unlike production trainers, classroom trainers do not fill-in on production lines, or even fill in as production trainers. Rather, the role of a classroom trainer is strictly limited to their duties. On the other hand, the record establishes that there is significant evidence of permanent interchange, as four of the six current classroom trainers were previously employed in classifications that are part of the existing unit.

Overall, I find the Employer's orientation process for new hires reflects a high degree of functional integration between the classroom trainers and the existing unit. Further, there is a significant amount of contact between the classroom trainers and the new hires, who are preparing to be employed in positions included in the existing unit. While evidence of temporary interchange is lacking this is balanced by the evidence of permanent interchange. Together, I find contact this factor weighs in favor of finding a community of interest between the classroom trainers and existing unit.

**(5) Terms and Conditions of Employment**

Petitioner contends the classroom trainers, as salaried non-exempt employees, are essentially the same as hourly employees in that they are eligible for overtime, record their actual hours worked, and are compensated for only those hours worked. The Employer contends the classroom trainers, as salaried non-exempt employees, are essentially the same as management because their compensation is identified as an annual salary, not an hourly rate established by contract. Both contentions are accurate, as the salaried non-exempt is a distinct third category that combines aspects of both a hourly and salaried employee. However, in substance, I find the salaried non-exempt method of compensation of the classroom trainers has more in common with the existing unit – overtime and compensation for actual hours worked – than management. Moreover, the amount of compensation earned by the classroom trainers, \$19.70 and \$20.10 an hour, falls firmly within the wage range covered by the collective-bargaining agreement, \$18.00 to \$22.60 an hour. Further, like the hourly bargaining unit employees, the classroom trainers clock in and out to record their time.

Regarding employees' terms and conditions of employment, classroom trainers share many fringe benefit plans and employment policies with employees outside the existing unit. The Employer specifically introduced evidence that classroom trainers, as salaried non-exempt employees, share an employee handbook with management and other salaried employees. However, I do not place much weight on these differences between the voting group sought and the bargaining unit precisely because of representation status, not some innate difference in the positions. In the *Armour-Globe* context, where one group of employees is represented and covered by contract, and the other is unrepresented and not covered by contract, terms and conditions will almost always differ simply because of the difference in representation.

Because the differences are a function of representation status, and because the classroom trainers and existing unit have similar terms and conditions of employment on important considerations such as the amount they are paid, I find this factor weighs in favor of finding a community of interest between the classroom trainers and existing unit.

#### **(6) Common Supervision**

Classroom trainers are supervised by the training manager, who also supervises the production trainers. The production trainers are included in the existing unit, and as such I find this common supervision supports finding a community of interest between the classroom trainers and the existing unit.

As to the next level of supervision, Petitioner highlights the recent changes in the reporting structure of certain departments, under which the training department now reports to the production department managerial hierarchy. The Employer counters that this is merely a pilot program with little to no impact on the employees in question. I do not find this question of hierarchy is as important as the shared supervision at the first level. As such, I do not rely on this evidence of management reorganization for this factor as much as I rely on the evidence of shared first-level supervision in the training department in reaching my conclusion that common supervision supports finding a community of interest.

#### **(7) Bargaining History**

The Employer argues the fact that classroom trainers have historically been excluded from the existing unit and Petitioner has never previously sought to represent them, weighs against finding a community of interest. While I agree that bargaining history can be a community of interest factor, the Employer misapplies it here in the *Armour-Globe* context. By definition, in the *Armour-Globe* setting, the petitioned-for voting group will be historically unrepresented, and the existing unit has a history of representation. To apply bargaining history in the manner suggested by the Employer would simply tip the scales in favor of the status quo, predisposing the Board to not find a community of interest in any *Armour-Globe* election. I do not find the general statements cited by the Employer, from outside the *Armour-Globe* context, such as “the Board is reluctant to disturb units established by collective bargaining as long as those units are not repugnant to Board policy...” in *The Boeing Co.*, 368 NLRB No. 67, slip op. at 1 (2019), weighs against a self-determination elections.

#### **iv) Conclusion Regarding Community of Interest**

I find the classroom trainers share a community of interest with the existing unit because they are included in the same department as the production trainers, are part of a functionally integrated system of employee training, have regular contact with, and permanent interchange from, the existing unit. I additionally rely upon the similar rates of pay of the classroom trainers and the existing unit and their shared supervision in the

training department in reaching my conclusion that a community of interest exists. While I recognize differences in terms and conditions of employment are present, this is to be expected in the *Armour-Globe* context, as by definition one group is covered by a collective bargaining agreement and the other is unrepresented.

For the reasons described above I conclude that the petitioned-for voting group of classroom trainers and the existing unit share a community of interest. Having found the petitioned-for voting group constitutes an identifiable, distinct segment of the workforce that shares a community of interest with the existing bargaining unit, I have directed the election sought in the petitioned-for voting group.

### METHOD OF ELECTION

The COVID-19 pandemic has had a profound impact on daily life in the United States. Because of the risk of infection associated with gatherings and in-person activities, the pandemic has also impacted on the way the Board conducts its elections. Many of the measures recommended by the Federal, state, and local governments to prevent the spread of the virus are well-known at this point: avoid social gatherings, avoid discretionary travel, practice good hygiene, maintain at least a 6-foot distance between individuals, and use cloth face coverings when around other people.<sup>12</sup>

Although it has not directly addressed Board elections, the CDC has issued guidance on elections in general. Its *Polling Locations and Voters* guidance states officials should “consider offering alternatives to in-person voting if allowed” and that “[v]oting alternatives that limit the number of people you come in contact with or the amount of time you are in contact with others can help reduce the spread of COVID-19.”<sup>13</sup> The CDC further states the virus can survive for a short period on some surfaces and that it is possible to contract COVID-19 by touching a surface or object that has the virus on it and then touching one’s mouth, nose, or eyes,” but “it is unlikely to be spread from domestic or international mail, products or packaging.”<sup>14</sup> To avoid the unlikely possibility of contracting COVID-19 through the mail, the CDC simply advises: “After collecting mail from a post office or home mailbox, wash your hands with soap and water for at least 20 seconds or use a hand sanitizer with at least 60% alcohol.”<sup>15</sup>

Congress has entrusted the Board with a wide degree of discretion in establishing the procedure and safeguards necessary to ensure the fair and free choice of bargaining representatives, and the Board in turn has delegated the discretion to determine the arrangements for an election to Regional Directors. *San Diego Gas and*

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<sup>12</sup> CDC, Protect Yourself (updated March 8), <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/prevention.html> (last viewed April 1).

<sup>13</sup> CDC, Considerations for Election Polling Locations, (updated January 4), <https://www.cdc.gov/coronavirus/2019-ncov/community/election-polling-locations.html> (last viewed April 22).

<sup>14</sup> CDC, *Frequently Asked Questions, Am I at risk for COVID-19 from mail, packages, or products?* (updated March 17, 2021), <https://www.cdc.gov/coronavirus/2019-ncov/faq.html> (last viewed April 22).

<sup>15</sup> CDC, *Running Errands* (updated December 31, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/daily-life-coping/essential-goods-services.html> (last viewed April 22).



*Elec.*, 325 NLRB 1143, 1144 (1998); citing *Halliburton Services*, 265 NLRB 1154 (1982); *National Van Lines*, 120 NLRB 1343, 1346 (1958); *NLRB v. A.J. Tower Co.*, 329 U.S. 324, 330 (1946). This discretion includes the ability to direct a mail-ballot election where appropriate. *San Diego Gas & Elec.* at 1144-1145. Whatever decision a Regional Director does make should not be overturned unless a clear abuse of discretion is shown. *National Van Lines* at 1346.

The Board's longstanding policy is that elections should, as a rule, be conducted manually. *National Labor Relations Board Casehandling Manual Part Two Representation Proceedings*, Sec. 11301.2.<sup>16</sup> However, a Regional Director may reasonably conclude, based on circumstances tending to make voting in a manual election difficult, to conduct an election by mail ballot. *Id.* This includes a few specific situations addressed by the Board, including where voters are "scattered" over a wide geographic area, "scattered" in time due to employee schedules, in strike situations, or other unspecified extraordinary circumstances. *San Diego Gas*, supra at 1145.

After a brief pause in elections early in the pandemic, the Board resumed conducting elections in April, with many Regional Directors, including myself, directing primarily mail ballot elections in light of the extraordinary circumstances presented by the COVID-19 pandemic. To assist Regional Directors in determining when a manual election could be conducted safely, on July 6 the General Counsel issued a memorandum titled "Suggested Manual Election Protocols," *Memorandum GC 20-10*, setting forth detailed suggested manual election protocols.

In *Aspirus Keweenaw*, 370 NLRB No. 45 (Nov. 9, 2020), the Board addressed how Regional Directors should assess the risks associated with the COVID-19 pandemic when considering the appropriate method of election. In doing so, the Board reaffirmed its long-standing policy favoring manual elections and outlined six situations that suggest the propriety of mail ballots due to the COVID-19 pandemic. Specifically, when one or more of the following situations is present, a Regional Director should consider directing a mail-ballot election:

1. The Agency office tasked with conducting the election is operating under "mandatory telework" status;
2. Either the 14-day trend in number of new confirmed cases of COVID-19 in the county where the facility is located is increasing, or the 14-day testing positivity rate in the county where the facility is located is 5 percent or higher;
3. The proposed manual election site cannot be established in a way that avoids violating mandatory state or local health orders relating to maximum gathering size;

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<sup>16</sup> I note that the provisions of the *Casehandling Manual* are not binding procedural rules: it is issued by the General Counsel of the National Labor Relations Board (General Counsel) and not the Board and is intended to provide guidance to regional personnel in the handling of representations cases. See *Patient Care*, 360 NLRB 637, 638 (2014), citing *Solvent Services*, 313 NLRB 645, 646 (1994).

4. The employer fails or refuses to commit to abide by *GC Memo 20-10*, “Suggested Manual Election Protocols;”
5. There is a current COVID-19 outbreak at the facility or the employer refuses to disclose and certify its current status; or
6. Other similarly compelling circumstances.

*Id.* slip op. at 4-7. The existence of one or more of these situations will normally suggest that a mail ballot is appropriate under the “extraordinary circumstances presented by this pandemic.” *Id.* slip op. at 4. The Regional Director has discretion to conduct an election by mail ballot “under the peculiar conditions of each case.” *Id.* slip op. at 3 (citing *National Van Lines*, 120 NLRB at 1346). The Regional Director’s determination to conduct an election manually or by mail is subject to an abuse of discretion standard. *Aspirus*, 370 NLRB No. 45, slip op. at 3 (citing *San Diego Gas & Electric*, 325 NLRB at 1144 n. 4). Finally, in *Aspirus*, the Board noted that a Regional Director who directs a mail-ballot election under one or more of the foregoing six situations will not have abused her or his discretion. *Aspirus*, 370 NLRB No. 45, slip op. at 8.

Recent developments regarding the pandemic have been both positive and negative. A positive development has been the rapidly expanding nationwide vaccination effort; as of April 22, almost 89 million individuals, or about 27 percent of the United States population, have been fully vaccinated.<sup>17</sup> A negative development has been the unfortunate emergence of new variant strains of COVID-19, including the B.1.1.7, B.1.351, and P.1. strains.<sup>18</sup> The CDC has stated that these variants, “have mutations in the virus genome that alter the characteristics and cause the virus to act differently in ways that are significant to public health (e.g., causes more severe disease, spreads more easily between humans, requires different treatments, changes the effectiveness of current vaccines).” Initial research suggests, as stated by the CDC, “[t]hese variants seem to spread more easily and quickly than other variants, which may lead to more cases of COVID-19.” The CDC further cautions that we do not yet know how widely these new variants have spread, how the disease caused by these new variants differs from the disease caused by other variants that are currently circulating, and how these variants may affect existing therapies, vaccines, and tests. As of April 22, the B.1.1.7, B.1.351, and P.1 variants have been confirmed as present in Colorado, and Colorado is only one of a few states with over 1000 confirmed cases of the B.1.1.7 variant.<sup>19</sup>

After careful examination of the record, the parties’ respective positions, and the current state of the COVID-19 virus in Colorado and Weld County, I have determined that a mail-ballot election is the appropriate option because the 14-day trend in the number of new confirmed cases of COVID-19 in Weld County is increasing and the 14-day testing positivity rate equivalent for Weld County is above 5 percent. In reaching

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<sup>17</sup> <https://covid.cdc.gov/covid-data-tracker/#vaccinations> (last viewed April 22).

<sup>18</sup> <https://www.cdc.gov/coronavirus/2019-ncov/transmission/variant-cases.html> (last viewed April 22).

<sup>19</sup> *Ibid.*

this decision, I have applied the six considerations set forth in *Aspirus Keweenaw*, *supra*, to the facts of this case.

Applying these factors, I first note that the Regional office is not currently in mandatory telework status. Regarding the third factor, I find no state, county or local measure regarding maximum gathering size would be implicated by a manual election. Finally, I find the Employer's commitments regarding precautions for a manual election are generally consistent with *GC Memo 20-10*. I have addressed the second and fifth factors below as they are determinative in this case.

In addressing the second consideration – whether the 14-day trend in the number of new confirmed cases of Covid-19 in the county where the facility is located is increasing, or the 14-day testing positivity rate in the county where the facility is located is 5 percent or higher – the Board directs Regional Directors to utilize the data published by Johns Hopkins University, or from official state or local government sources. Where county level data are not available, Regional Directors should look to state level data.

Here, the 14-day trend in Weld County appears to be increasing. The John Hopkins University COVID-19 Status Report for Weld County, Colorado on April 22, shows the daily rate of new cases for the preceding 14-day period. The daily rates vary each day, but the daily average for the first week is 95, while the daily average for the most recent week is about 104 new cases per day, which demonstrates an increasing trend for that period.<sup>20</sup> Further, Weld County publishes a "two-week average positive test rate," which appears equivalent to the 14-day testing positivity rate referenced by the Board in *Aspirus*. As of April 22, that rate is 7.98 percent,<sup>21</sup> and the overall 14-day testing positivity rate for the State of Colorado is 5.78 percent.<sup>22</sup>

As to the 14-day positivity rate, the Employer argues that Greeley specific data should be used, narrowed to the zip code where the facility is located, 80631. As of April 22, the two week average positive test rate for zip code 80631 is 2.8, which is significantly lower than the County positivity rate for the same period.<sup>23</sup> I do not dispute that in some circumstances this could be the best data to use. In this matter, I do not find it is appropriate to rely on a particular zip code since the Employer has a very large workforce and it is unlikely that all employees live in the area covered by one zip code. Given the size of the workforce, countywide data gives the best view of the current COVID-19 situation at the Employer's facility.

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<sup>20</sup> <https://bao.arcgis.com/covid-19/jhu/county/08123.html> (last viewed April 22). The averages are rounded to the nearest whole number. The first week starting with day 14 lists the following cases per day: 121, 115, 94, 73, 60, 118, and 86. The most recent week lists the following cases per day: 77, 148, 109, 96, 61, 11, and 123.

<sup>21</sup>

[https://www.weldgov.com/departments/health\\_and\\_environment/2019\\_novel\\_coronavirus/covid19\\_data](https://www.weldgov.com/departments/health_and_environment/2019_novel_coronavirus/covid19_data) (last viewed April 22).

<sup>22</sup> <https://coronavirus.jhu.edu/testing/testing-positivity> (last viewed April 22).

<sup>23</sup> <https://www.co.weld.co.us/maps/covidzipcode/> (last viewed April 22).

The fifth consideration in *Aspirus*, in relevant part, considers whether there is a current COVID-19 outbreak at the Employer's facility. The Colorado Department of Health and Environment publishes a report of active and resolved COVID-19 outbreaks in Colorado.<sup>24</sup> The most recent report, dated April 21, identifies an "active" outbreak at the "JBS Greeley Beef Plant: November 2020," with 114 reported total staff cases, initially reported on November 13, 2020. At hearing, questioned regarding the outbreak, the Employer took the position it had occurred, but had been resolved as of the time of the hearing, and that the report was outdated. Petitioner disputed this contention and noted at the time Colorado was reporting the November outbreak resulted in 99 cases.

Following the hearing, on March 17, I issued an order directing the parties to address the issue of an ongoing outbreak at the Greeley plant based on Petitioner's assertion that there had been an outbreak. Both parties responded, with the Employer stating as of March 30, there had been one positive COVID-19 result in the last 14 days, and Petitioner replying that 5 employees had tested positive between March 10 and 12.

It is unclear what the status of the outbreak at this facility is at this time, but it is not necessary to determine the status given the relevant 14-day increasing trend in new cases in Weld County and the current 14-day positivity rate in Weld County that is well over 5 percent. Based on the second factor set forth in the Board's *Aspirus* decision, I find that it is appropriate to conduct the election by mail ballot.<sup>25</sup>

## CONCLUSIONS

Based on the entire record in this matter and in accordance with the discussion above, I conclude and find as follows:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are affirmed.<sup>26</sup>

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<sup>24</sup> <https://covid19.colorado.gov/covid19-outbreak-data> (last viewed April 22).

<sup>25</sup> The presence of the COVID-19 variants in Colorado is also a compelling circumstance supporting a mail ballot election in this case. However, in view of the clear 14-day increase in the number of COVID-19 cases in Weld County and the current positivity rate for Weld County, it is not necessary to rely on this factor.

<sup>26</sup> The Employer specifically disputes the hearing officer's granting Petitioner's Petition to Revoke the Employer's subpoena at hearing. The Employer asserted at hearing that it sought the documents for the purpose of establishing the credibility of witnesses, and the hearing officer granted the Petition to revoke on the basis a representation case hearing is an investigatory, nonadversarial proceeding without credibility determinations. *Case Handling Manual II (Representation)*, Sec.11181 and 11185; *Marian Manor For the Aged*, 333 NLRB 1084 (2001) ("... a preelection hearing is investigatory in nature and credibility resolutions are not made.") On brief, the Employer acknowledges this point, but argues it ignores the practical reality of addressing testimony in conflict. To the extent this is an argument directed to the Board regarding representation case procedures I have not addressed it here.

2. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction herein.<sup>27</sup>

3. The labor organization involved claims to represent certain employees of the Employer.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

5. The following employees of the Employer constitute an appropriate voting group:

Included: All full-time and regular part-time classroom trainers;

Excluded: All other employees, guards, and supervisors as defined by the National Labor Relations Act.

### **DIRECTION OF ELECTION**

The National Labor Relations Board will conduct a secret ballot election among the employees in the voting group found appropriate above. Employees will vote whether or not they wish to be represented for purposes of collective bargaining by **UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, LOCAL**

**7.** If a majority of valid ballots are cast for United Food and Commercial Workers International Union, Local 7, they will be taken to have indicated the employees' desire to be included in the existing unit currently represented by the United Food and Commercial Workers International Union, Local 7, at the Employer's Greeley, Colorado facility. If a majority of valid ballots are not cast for representation, they will be taken to have indicated the employees' desire to remain unrepresented.

#### **A. Election Details**

I have determined that the election will be conducted by mail ballot.

The ballots will be mailed to employees employed in the appropriate voting group. At **3:00 p.m. (MDT) on Monday, May 10, 2021**, ballots will be mailed to voters from the office of the National Labor Relations Board, Region 27, located at the Byron Rogers Federal Office Building, 1961 Stout Street, Suite 13-103, Denver, CO 80294.

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<sup>27</sup> During the hearing the parties stipulated to the following commerce facts:

The Employer, Swift Beef Company, a subsidiary of JBS USA Food Company, is a Delaware corporation, with a principal location in Greeley, Colorado, engaged in the business of processing and delivering wholesale beef products. During the past calendar year, a representative period, the Employer sold goods and services valued in excess of \$50,000 directly to customers located outside the State of Colorado.

Voters must sign the outside of the envelope in which the ballot is returned. Any ballot received in an envelope that is not signed will be automatically void.

Those employees who believe that they are eligible to vote and did not receive a ballot in the mail by **May 17, 2021**, should communicate immediately with the National Labor Relations Board by either calling the Region 27 Office at **(303) 844-3551** or our national toll-free line at **1-866-667- NLRB (1-866-667-6572)**.

All ballots will be commingled and counted at the Region 27 Office located on **Tuesday, May 25, 2021 at 3:00 p.m.** (MDT). In order to be valid and counted, the returned ballots must be received in the Region 27 Office prior to the counting of the ballots.

The parties will be permitted to participate in the ballot count by videoconference to be arranged by the Region. In order to be valid and counted, the returned ballots must be received at the Regional Office prior to the counting of the ballots.

## **B. Voting Eligibility**

Eligible to vote are those in the unit who were employed during the payroll period ending April 11, 2021, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off.

Employees engaged in an economic strike, who have retained their status as strikers and who have not been permanently replaced, are also eligible to vote. In addition, in an economic strike that commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Unit employees in the military services of the United States may vote if they appear in person at the polls.

Ineligible to vote are (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

## **C. Voter List**

As required by Section 102.67(l) of the Board's Rules and Regulations, the Employer must provide the Regional Director and parties named in this decision a list of the full names, work locations, shifts, job classifications, and contact information (including home addresses, available personal email addresses, and available home and personal cell telephone numbers) of all eligible voters.

To be timely filed and served, the list must be received by the regional director and the parties by **Monday, April 26, 2021**. The list must be accompanied by a certificate of service showing service on all parties. **The region will no longer serve the voter list.**

Unless the Employer certifies that it does not possess the capacity to produce the list in the required form, the list must be provided in a table in a Microsoft Word file (.doc or docx) or a file that is compatible with Microsoft Word (.doc or docx). The first column of the list must begin with each employee's last name and the list must be alphabetized (overall or by department) by last name. Because the list will be used during the election, the font size of the list must be the equivalent of Times New Roman 10 or larger. That font does not need to be used but the font must be that size or larger. A sample, optional form for the list is provided on the NLRB website at [www.nlr.gov/what-we-do/conduct-elections/representation-case-rules-effective-april-14-2015](http://www.nlr.gov/what-we-do/conduct-elections/representation-case-rules-effective-april-14-2015).

When feasible, the list shall be filed electronically with the Region and served electronically on the other parties named in this decision. The list may be electronically filed with the Region by using the E-filing system on the Agency's website at [www.nlr.gov](http://www.nlr.gov). Once the website is accessed, click on **E-File Documents**, enter the NLRB Case Number, and follow the detailed instructions.

Failure to comply with the above requirements will be grounds for setting aside the election whenever proper and timely objections are filed. However, the Employer may not object to the failure to file or serve the list within the specified time or in the proper format if it is responsible for the failure.

No party shall use the voter list for purposes other than the representation proceeding, Board proceedings arising from it, and related matters.

#### **D. Posting of Notices of Election**

Pursuant to Section 102.67(k) of the Board's Rules, the Employer must post copies of the Notice of Election, which will be sent imminently, in conspicuous places, including all places where notices to employees in the unit found appropriate are customarily posted. The Notice must be posted so all pages of the Notice are simultaneously visible. In addition, if the Employer customarily communicates electronically with some or all of the employees in the unit found appropriate, the Employer must also distribute the Notice of Election electronically to those employees. The Employer must post copies of the Notice at least 3 full working days prior to 12:01 a.m. of the day of the election and copies must remain posted until the end of the election. For purposes of posting, working day means an entire 24-hour period excluding Saturdays, Sundays, and holidays. However, a party shall be estopped from objecting to the nonposting of notices if it is responsible for the nonposting, and likewise shall be estopped from objecting to the nondistribution of notices if it is responsible for the nondistribution.

Failure to follow the posting requirements set forth above will be grounds for setting aside the election if proper and timely objections are filed.

### **RIGHT TO REQUEST REVIEW**

Pursuant to Section 102.67 of the Board's Rules and Regulations, a request for review may be filed with the Board at any time following the issuance of this Decision until 10 business days after a final disposition of the proceeding by the Regional Director. Accordingly, a party is not precluded from filing a request for review of this decision after the election on the grounds that it did not file a request for review of this Decision prior to the election. The request for review must conform to the requirements of Section 102.67 of the Board's Rules and Regulations.

A request for review must be E-Filed through the Agency's website and may not be filed by facsimile. To E-File the request for review, go to [www.nlrb.gov](http://www.nlrb.gov), select E-File Documents, enter the NLRB Case Number, and follow the detailed instructions. If not E-Filed, the request for review should be addressed to the Executive Secretary, National Labor Relations Board, 1015 Half Street SE, Washington, DC 20570-0001, and must be accompanied by a statement explaining the circumstances concerning not having access to the Agency's E-Filing system or why filing electronically would impose an undue burden. A party filing a request for review must serve a copy of the request on the other parties and file a copy with the Regional Director. A certificate of service must be filed with the Board together with the request for review.

Neither the filing of a request for review nor the Board's granting a request for review will stay the election in this matter unless specifically ordered by the Board. If a request for review of a pre-election decision and direction of election is filed within 10 business days after issuance of the decision and if the Board has not already ruled on the request and therefore the issue under review remains unresolved, all ballots will be impounded. Nonetheless, parties retain the right to file a request for review at any subsequent time until 10 business days following final disposition of the proceeding, but without automatic impoundment of ballots.

Dated at Denver, Colorado on the 22nd day of April 2021.

*/s/ Paula Sawyer*

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